

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

10 PALOMAR GRADING AND PAVING
11 INC., a California Corporation, and
12 THE UNITED STATES OF AMERICA
for the use and benefit of PALOMAR
GRADING AND PAVING, INC.

Civil No.08cv521 JAH (WMc)

**ORDER GRANTING
DEFENDANT'S MOTION TO
COMPEL MEDIATION AND STAY
PROCEEDINGS [Doc. No. 10]**

13 Plaintiff,

V.

14 WESTERN INSURANCE COMPANY
15 AND CORNERSTONE BUILDING
GROUP.

Defendants.

18 AND RELATED CROSS-CLAIM AND
THIRD PARTY COMPLAINT

BACKGROUND

21 On March 20, 2008, Plaintiff Palomar Grading and Paving Inc. (“Palomar”) filed
22 a complaint against Cornerstone Building Group (“CBG”) and Western Insurance
23 Company (“Western”) for payment bond, breach of contract, work and labor, conversion
24 and insurance bad faith. See Complaint (Doc. No. 1). Plaintiff alleges CBG entered into
25 a written contract with the United States Navy for the construction or reconstruction of
26 a facility. Complaint ¶ 6. Palomar and CBG entered into a written agreement
27 (“subcontract”) for performance of construction work on the United States Navy project
28 dated October 6, 2006. Id. ¶ 9. Plaintiff further alleges CBG executed a payment bond

1 with Western Insurance Company (“Western”) as surety on or about October 6, 2006.
 2 Id. ¶ 7. According to the allegations of the complaint, Palomar completed all work
 3 required under the contract, but CBG refuses to pay the amount owed for the work. Id.
 4 ¶¶ 10, 11. Plaintiff further argues it filed a bond claim with Western, but the claim was
 5 denied. Id. ¶ 12.

6 On May 2, 2008, Defendant CBG filed a motion to compel arbitration and stay the
 7 action.¹ Plaintiff initially filed a response on May 22, 2008 contending the motion was
 8 moot, because an early neutral evaluation conference was scheduled before the Honorable
 9 William McCurine Jr., United States Magistrate Judge. Finding Plaintiff provided no
 10 authority for its position, the Court continued the hearing on the motion and directed
 11 Plaintiff to file a supplemental brief supporting its contention and addressing the merits
 12 of Defendant’s motion. Plaintiff filed a response on June 12, 2008, and Defendant filed
 13 a reply on June 20, 2008. The motion was set for hearing on June 30, 2008, but was
 14 taken under submission pursuant to Local Rule 7.1(d.1).

DISCUSSION

16 CBG contends the subcontract provides for mandatory mediation, which it has not
 17 waived, and, therefore, moves this Court for an order directing the parties to participate
 18 in mediation and staying the proceedings.

19 The subcontract reads, in relevant part:

20 To the extent Subcontractor submits a claim which Contractor determines
 21 is one for which Owner may not be liable, or is one which Contractor elects
 22 to not allow Subcontractor to further pursue with Owner, or to the extent
 Contractor has a claim against Subcontractor, the following procedures shall
 apply and begin within 60 days of notification:

23 (a) If the dispute cannot be settled through direct discussions, the parties
 24 shall attempt to settle the dispute by mediation before recourse to any
 25 other method of dispute resolution. Unless the parties agree
 otherwise, the mediation shall be conducted in accordance with the
 Construction Mediation Rules of the American Arbitration
 Association.

26 Defendant’s Exh. A, Subcontract at 17-18.

27 Defendant maintains the parties tried unsuccessfully to settle the dispute through

28 ¹Defendant filed the motion as a “petition to compel arbitration.” See Doc. No. 10.

1 informal discussions. Thereafter, CBG made a demand for compliance with the mediation
2 provision of the subcontract, but Palomar refused and filed the pending action instead.

In response, Plaintiff contends it does not oppose mediation, but believes the early neutral evaluation conference previously scheduled for June 30, 2008 and the authority to order further mediation vested by Local Rule 16.1(c.2) should be used to facilitate the mediation which is the subject of CBG's motion. Palomar argues ordering the parties to participate in mediation will not result in complete relief, because Western² is not a party to the subcontract and is not bound by the mediation clause. In lieu of granting the motion, Palomar suggests the parties ask Judge McCurine to order all parties to attend mediation pursuant to Local Rule 16.1(c.2) at the early neutral evaluation conference if the matter is not resolved at the conference.

12 In reply, CBG argues Palomar fails to provide any authority for its contention that
13 an early neutral evaluation conference will provide an adequate substitute for the rules and
14 processes of a formal mediation. Defendant further argues a mediator bound by the
15 Construction Mediation Rules who has experience in construction litigation, is more
16 properly suited to negotiate a resolution.

17 This Court finds the subcontract requires the parties seek mediation “*before* recourse
18 to any other method of dispute resolution” if informal discussions fail. Subcontract at 17-
19 18 (emphasis added). Plaintiff neither disputes the validity of the contract or that the
20 contract mandates mediation. The Court is not persuaded by Plaintiff’s argument that the
21 early neutral evaluation conference or the authority to order mediation under the local
22 rules moots or resolves Defendant’s request for mediation in light of the clear language of
23 the contract requiring mediation before filing suit. The issue here is not whether the
24 magistrate judge could successfully facilitate a case dispositive mediation via the local rules
25 of the court. Rather, it is one of interpretation of clear contract language. For Plaintiff to
26 argue that this Court should ignore the contract’s clear terms suggests that Plaintiff seeks

²⁸ Plaintiff contends the defendants in the related case Bill Lowe Developments v. Western Ins. Co., 08cy0603 are also not required to participate in a mediation.

1 to selectively enforce some contract provisions but not others. Based upon the contract
2 language and Plaintiff's non-opposition to participating in mediation, the Court finds the
3 motion should be granted.

4 Accordingly, **IT IS HEREBY ORDERED:**

- 5 1. Defendant CBG's motion to compel mediation is **GRANTED**. The parties
6 shall participate in mediation as provided in the subcontract.
- 7 2. Defendant's motion to stay the action pending the completion of mediation
8 is **GRANTED**.
- 9 2. The parties shall contact Judge McCurine's Chambers within 10 days from
10 the date of this order to schedule a status conference to track the progress of
11 the mediation.
- 12 3. Judge McCurine may hold periodic status conferences to track the mediation
13 and insure the stay is in effect only for as long as appropriate. As such, Judge
14 McCurine may lift the stay and set the matter for pretrial proceedings upon
15 determining it is appropriate to do so.

16 DATED: June 27, 2008

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18 JOHN A. HOUSTON
United States District Judge

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